

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Farm Journal, Inc.)	MB Docket No. 06-92
Petition for Declaratory Ruling)	
_____)	

PETITION FOR RECONSIDERATION

RFD Communications, Inc. (“RFD”), by counsel, and pursuant to Section 1.106 of the Commission’s Rules, hereby submits this Petition for Reconsideration of the Order and Declaratory Ruling (“*Order*”) in the proceeding referenced above.¹ RFD urges the Commission promptly to reverse its decision in the *Order* so that delivery of a valuable public service to millions of rural residents is not unnecessarily disrupted.

The *Order* found that RFD could not use direct broadcast satellite (“DBS”) set-aside capacity for so long as it carried programming provided by Superior Livestock Auctions, Inc. (“Superior”) on what the Commission characterized as an exclusive and discriminatory basis.² The Commission concluded that carriage of that particular auction programming was not consistent with the requirements for set-aside channels because, allegedly, “RFD-TV *favours certain programming*, maintains a *significant exclusive relationship* with Superior, a commercial enterprise, and acts as if it is a commercial enterprise....”³ In fact, RFD does not “favor” certain

¹ See *In the Matter of Farm Journal, Inc. Petition for Declaratory Ruling*, MB Docket No. 06-92, FCC 06-172 (rel. Dec. 4, 2006) (“*Order*”).

² *Order* at ¶ 11.

³ *Order* at ¶ 7 (emphasis added). See *id.* at ¶ 1 (RFD “favours certain programming”), ¶ 8 (“RFD-TV maintains a direct, exclusive relationship with Superior,” RFD “promotes Superior livestock auctions to the exclusion of those of competing livestock auction companies,” RFD-TV

programming to the exclusion of other services, and does not act in any commercial capacity. Since the basic factual predicate of the *Order* is incorrect, the Commission should reverse its decision.⁴ Moreover, reconsideration would serve the public interest by preserving access to valuable informational programming of keen interest to RFD's rural and agricultural viewers.

I. RFD Does Not Discriminate Against Other Providers of Auction Programming, and Has No Commercial Relationship With or Interest in Superior

As a set-aside channel, RFD-TV has not in the past, does not now, and will not in the future, discriminate against competing auction services, contrary to the conclusions stated in the *Order*. Rather, RFD-TV has been, and remains to this day, open to broadening its noncommercial program offerings to best serve the varied interests of its rural and agricultural audience members. RFD has actively and repeatedly solicited alternative auction programming, *even though no provider of such programming contacted RFD directly to seek carriage*. Indeed, RFD has taken special measures to secure access to such programming. As the Commission is aware, in an effort to attract programming from a provider, RFD offered to preempt its own scheduled programming when possible to carry auctions live and, in instances where preemption was not feasible – for example, during live coverage of the Future Farmers of America Convention – RFD offered to carry auction programming on alternative dates.⁵ Although RFD

and Superior “act as if they are partners,” and “there is a significant and ongoing relationship between RFD-TV and Superior”); ¶ 9 (RFD-TV “airs only those livestock auctions conducted by Superior, to the exclusion of livestock auctions performed by other auctioneers,” RFD-TV airs Superior programming “to the exclusion of others,” and RFD-TV “maintains a special relationship with Superior”); and ¶ 11 (RFD-TV promotes Superior’s auctions “to the exclusion of other livestock auctions”).

⁴ See 47 C.F.R. § 1.106(b), (c).

⁵ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *State Farm*, 463 U.S. at 43, 50-51; *Bethlehem Steel Corp. v. EPA*, 651 F.2d 861, 867 (3rd Cir. 1981); see *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134-35 (D.C. Cir. 2002); *Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000).

did not succeed in acquiring the rights to that programming, the fact that RFD engaged in substantial efforts to secure such services refutes any notion that RFD “favors” Superior’s auction service.

Moreover, RFD does not have any “exclusive” arrangement with Superior. There is no agreement or understanding of any kind by which RFD has agreed, directly or indirectly, to carry auction programming from Superior on an exclusive basis.⁶ Nor, as shown above, does RFD refuse to consider auction programming from other sources. Contrary to the *Order’s* findings, RFD does not discriminate against alternative providers.

Similarly, RFD does not act as a commercial enterprise by carrying programming of Superior’s auctions. Contrary to the Commission’s initial conclusions, RFD does not have any “special relationship” with or any “invest[ment] in the success of” Superior’s auctions. As noted in the record, RFD does not have any interest whatsoever in the success (or failure) of any auction event or of any particular transaction occurring within such event. Rather, RFD’s sole interest in such programming is to provide a valuable educational and informational service to its viewers.⁷

⁶ The *Order* concludes that RFD’s relationship with Superior “appears to extend beyond the mere airing of livestock auctions” because “RFD-TV’s senior management includes the former Sale Director of Superior.” RFD’s President, Patrick Gottsch, severed his employment relationship with Superior *almost ten years ago*. No other employment, consulting or economic relationship has existed between them since that time.

⁷ The sole consideration provided to RFD is in the nature of a programmer’s sponsorship payment to cover RFD’s costs of distribution. While Superior has been a significant contributor to RFD since its inception, Superior’s overall contribution to RFD has steadily declined as the program service has matured and expanded in scale and scope, and it is now at an all-time low. Moreover, descriptions of the auction programming on RFD’s website and in its program guide are similar to the descriptions of other programming carried by RFD. Thus, RFD treats Superior as any other program supplier.

II. Reconsideration of the *Order* Will Serve the Public Interest

FCC reconsideration of its initial decision in this proceeding unequivocally will serve the public interest. At a minimum, failure to reconsider the *Order* puts at risk RFD-TV's ability to carry important live programming, which is a unique and critical source of "real time" information for cattle ranching industry participants and enthusiasts. The auctions provide critical market-based information to hundreds of thousands of livestock ranchers and many other parties with interests in this important aspect of the nation's agricultural industry. If RFD-TV is compelled to cease carriage of Superior livestock auctions, many of these viewers will be left with no alternative means of access to critical information. This would deprive many ranchers of key developments and trends in their industry and would greatly undermine RFD's ability to meet the informational needs of rural and agricultural America.

RFD-TV began carrying a wide variety of video auctions in 2002 at the request of America's *cattlemen*. Due to the remote locations of most cattle enterprises, accurate and timely information about critical variables that affect today's cattle industry—such as breed, weight, location, vaccination programs, and weather conditions—is difficult to obtain. The video auctions provide ranchers and farmers with data they need to plan and manage their own businesses. For these farmers and ranchers, there is no substitute for being able to "see" first-hand how these variables affect their industry, without having to travel substantial distances to view an auction in person. Enabling ranchers to continue running their enterprises in the most effective and efficient manner possible, with the most current information available, will serve the public interest.⁸

⁸ See, e.g., Comments of Robert Myers, Pelican, LA (noting use of RFD-TV "for agricultural information and valuation of cattle" as well as "critical information in macro management of [his] business"); Comments of Leroy Hill, Geyser, MT (noting that "a good share of the neighboring ranches [make] marketing decisions based on [the] sales" shown on the

At worst, allowing the *Order* to stand could cause RFD-TV to lose carriage on both DIRECTV and EchoStar. Indeed, in response to the FCC's initial decision, DIRECTV has advised RFD that the *Order* "raises issues related to DIRECTV's interest in and willingness to continue carrying RFD-TV at all."⁹ RFD has received similar correspondence from EchoStar.¹⁰ Because the vast majority of RFD-TV viewers reside in rural areas that often do not have access to cable service, loss of DBS carriage would deprive millions of viewers of access to the *only* existing video network dedicated exclusively to meeting the particular needs and interests of the nation's historically underserved rural and agricultural communities.

Loss of DBS carriage would undermine both the clear purpose underlying the commercial set aside program¹¹ and the agency's interest in preserving educational programming, especially that which is dedicated to a historically underserved audience.¹² As RFD already has explained to the FCC, RFD-TV came into being as an unprecedented informational outlet for viewers interested in agriculture and other rural-oriented issues. In fulfilling its mission, the network has provided its audience with a wide variety of informational

Superior Cattle Auction); Comments of Jay W. Johnson, Happy, TX (noting usage of Superior Livestock Auction and Superior Productions to "stay in tune" with market dynamics).

⁹ See Letter from Reagan E. Feeney, DIRECTV, to Patrick Gottsch, President, RFD Communications, Inc. (Dec. 6, 2006) (Attachment 1).

¹⁰ See Letter from Todd T. Hoy, EchoStar, to Patrick Gottsch, President, RFD Communications, Inc. (Dec. 5, 2006) (Attachment 2).

¹¹ As the legislative history of the Section 335(b) states, the purpose of the set-aside provision is "to define the obligation of direct broadcast satellite service providers to provide a minimum level of educational programming." House Committee on Energy and Commerce, H.R. Conf. Rep. No. 102-862, at 222 (1992).

¹² As former Chairman William E. Kennard noted in implementing the set aside requirements, "Congress set aside a portion of the spectrum used by DBS to ensure that we have access to quality programming—programming for children, senior citizens, distance learning, health care applications, and for celebrating our diversity." *DBS Public Interest Obligations First Report and Order*, Statement of Chairman William E. Kennard, 13 FCC Rcd 23254.

and educational programs that are truly distinct in the current programming marketplace.

Among the network's extensive program line-up are dozens of such programs, including a host of agricultural news and public affairs offerings focusing on regional, national, and international issues; agricultural convention coverage; coverage of important legislative initiatives; numerous programs dedicated to the needs and interests of the equine industry; and regional and national rural lifestyle and family-friendly cultural programs.¹³

But for RFD-TV, millions of viewers would have nowhere to turn for comparable informational programming dedicated to their interests. Public comment received by the FCC in this proceeding demonstrates overwhelming support for RFD-TV's programming and indicates that the loss of this highly valued service would be a significant detriment to many of its viewers.¹⁴ Commenters also make clear that RFD-TV's programming provides unique and

¹³ Just a few of the educational and informational programs RFD provides include: (1) *Farmweek*, Mississippi's oldest and only locally-produced agricultural television program, which provides an important vehicle for Mississippi State University specialists, scientists, and researchers to present useful information and land management advice directly to viewers; (2) *Farm Bureau Today*, a weekly program produced by various state bureaus, including the Texas, Florida, Idaho, Mississippi, North Carolina, Ohio, Pennsylvania, and Virginia Farm Bureaus, along with the Alabama Farmers Federation; (3) *The Georgia Farm Monitor*, the only weekly news and informational program dedicated to Georgia's agricultural industry; (4) *Oklahoma Horizon*, a 30-minute weekly show that is a partnership between the Oklahoma Department of Agriculture, Food and Forestry and the Oklahoma Department of Career and Technology Education and aims to provide viewers with a global perspective on agricultural issues via stories with a local focus; (5) *Making it Grow!*, a highly interactive, live television program focusing on the horticultural and agricultural issues of South Carolina; and (6) *Today's Ag*, the only rural television program backed by land grant universities, providing viewers with a first-hand connection to the agricultural research from and knowledge put out by public universities.

¹⁴ See, e.g., Comments of Angela Meroshnekoff, Potter Valley, CA ("RFD-TV is very educational and not having it would be a big loss to my students."); Comments of Steve Kaluf, Muncie, IN ("The educational programming offered by RFD-TV is second to none"); Comments of Bruce Goode, Gunter, TX ("RFD-TV is a unique and wonderful educational channel."); Comments of Annette Culbertson, Lynchburg, SC (noting that RFD-TV not only is "educational for people in rural areas, but it also helps instill a sense of the earth and its many wonders to the next generation"); Comments of Chris Nelson, Visalia, CA ("The importance of the informational and educational programming that RFD-TV provides for rural America, and in particular, my farm and ranch family, cannot be overstated."); Comments of Rebecca Jacobs, Raleigh, NC ("RFD-TV is very educational.").

valuable information that is critical in a variety of subject areas, including equine training and rescue operations, farm education, safety for novice farmers, and matters of key importance to industry.¹⁵

Likewise, loss of DBS carriage would be a huge blow to the interests of RFD's varied program suppliers—many of whom are land grant universities, academics, and state agricultural bureaus.¹⁶ Since its inception, RFD has featured the work of a variety of governmental entities and rural organizations, and has given these important groups an unparalleled outlet to address matters of particular importance to their respective constituents, members, and the public at large. For example, RFD-TV programming regularly includes representatives from the United States Department of Agriculture and numerous sub-agencies under the USDA. Further, RFD-TV provides organizations that represent farmers and ranchers with unparalleled access to their

¹⁵ See, e.g., Comments of AnneMarie Cross, Crosswinds Equine Rescue, Tuscola, IL (Noting “as a rural farm owner [] and the president of a small nonprofit horse rescue” that her organization uses RFD-TV “every day for educational and training purposes [and] to help new horse owners and those interested in horses to learn more...”); Comments of Steve Kaluf (“As a family [] heavily involved in 4-H and FFA activities RFD-TV provides programming extremely beneficial to us”); Comments of Bruce Goode (“I have enjoyed watching RFD-TV for its variety of educational programming, but mainly because of the informational content useful for my equine-related business.”); Comments of Jan Goethals, Royce City, TX (noting that “RFD-TV has been very helpful and may have prevented injury or worse by disseminating information and instruction not easily or readily available to the novice farmer”); Comments of Ronnie Ault, Seymour, IN (noting that RFD-TV provides “great information on crop input [] and livestock programming that is essential for the cattleman” as well as very enjoyable “tractor shows and tractor pulls”); Comments of Richard L. Nock, San Luis Obispo, CA (“The forums held by the NCBA and the Cattleman's Beef Board on critical issues within the beef industry [and aired on RFD-TV] have proven to be instrumental in resolving important issues in [] a divided industry.”); Comments of Mark and Lois Fleer, Hoskins, NE (noting enjoyment of “US Farm Report and Ag PhD especially”).

¹⁶ These academic institutions include: the University of Illinois, Oklahoma State University, University of Nebraska, Louisiana State University, Texas A&M University, Clemson University, South Dakota State University, Iowa State University, and Mississippi State University.

members.¹⁷ These public interest-oriented program suppliers spend enormous amounts of time and energy to bring exceptional educational services to their viewers. Without a viable distribution outlet in rural America, however, many of these programs may cease to be produced.

Accordingly, to ensure continued delivery of a valuable educational and informational service uniquely dedicated to meeting the needs of the rural and agricultural communities, RFD respectfully requests the Commission to reconsider the *Order* and conclude that RFD remains qualified to be counted as a DBS set-aside channel.

Respectfully submitted,
RFD COMMUNICATIONS, INC.

By: /s/ Todd M. Stansbury
Todd M. Stansbury
Eve Klindera Reed
of
Wiley Rein & Fielding LLP
1776 K Street NW
Washington, DC 20006

Its Attorneys

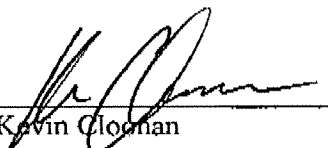
January 3, 2007

¹⁷ These organizations include: the American Farm Bureau Federation (5.1 million members), twenty-seven individual state Farm Bureau organizations, the National FFA Organization (490,000 members), the American Angus Association (35,000 members), the American Sheep Industry Association (12,000 members), the American Soybean Association (26,000 members), the Animal Health Institute, the Biotechnology Industry Organization, the Cotton Board, the Council for Biotechnology Information, Dairy Management, Inc., the Farm Equipment Manufacturers Association, the National Agrimarketing Association, the National Association of Conservation Districts, the National Association of County Agricultural Agents, the National Association of Farm Broadcasters, the National Christmas Tree Association, the National Corn Growers Association, the National Farmers Organization, the National Grange, the National High School Rodeo Association, the National Peanut Board, the National Pork Board, the Renewable Fuels Association, the Soil & Water Conservation Society, the U.S. Grains Council, the U.S. Meat Export Foundation, the United Soybean Board, the National 4-H Council, Farm Safety 4 Just Kids, the American Quarter Horse Association, the Paso Fino Association, the American Paint Horse Association, the Arabian Horse Association, the Tennessee Walking Horse Breeders Association, the National Cutting Horse Association, the Mustang Horse Association, the National Reining Horse Association, the Bill Monroe Foundation, and the National Cattlemen's Beef Association.

DECLARATION OF KEVIN CLOONAN

I, Kevin Cloonan, hereby declare under penalty of perjury:

1. I am Chief Financial Officer of RFD Communications, Inc.
2. I have read the foregoing Petition for Reconsideration of RFD Communications, Inc. To the best of my knowledge, information and belief, the facts contained therein are true and correct.


Kevin Cloonan

January 3, 2006



December 6, 2006

BY OVERNIGHT DELIVERY AND FACSIMILE

Patrick Gottsch
President
RFD Communications, Inc.
22424 Wright Plaza
Elkhorn, NE 68022

Re: RFD's Compliance with FCC Set-Aside Rules

Dear Mr. Gottsch:

I am writing to follow up on our conversations and correspondence in the wake of the Federal Communications Commission's finding that RFD-TV "does not meet the criteria to be classified as a programmer qualified to be carried in any DBS channel capacity" reserved under the DBS set-aside rules. *Farm Journal, Inc.*, Order and Declaratory Ruling, FCC 06-172, ¶ 1 (rel. Dec. 4, 2006) ("*FCC Declaratory Ruling*").

Because of the FCC's finding, DIRECTV may no longer rely on RFD-TV as a "qualified programmer" for purposes of the set-aside. 47 C.F.R. § 25.701(f). Accordingly, DIRECTV will amend its public filings to reflect that it complies with the FCC's set-aside rules using programming other than that provided by RFD-TV.

The FCC's finding also raises issues related to DIRECTV's interest in and willingness to continue carrying RFD-TV at all. As you know, DIRECTV now carries RFD-TV under a month-to-month arrangement, which either party may terminate with thirty days' notice. Moreover, the long-form agreement that has been extended explicitly permits DIRECTV to terminate carriage "if at any time [RFD-TV] fails to comply with the terms of the FCC order (including without limitation continuing to maintain its status as a "qualified programmer . . ."). Affiliation Agreement for DBS Satellite Exhibition of Cable Network Programming, ¶ 6(c)(2) (Feb 4, 2002) ("2002 Agreement") (emphasis added); see also *id.*, ¶ 5(b)(iii) (representing that RFD-TV "is, and shall remain

throughout the Term, a 'qualified programmer'"); *id.*, ¶ 6(b)(i) (permitting termination upon breach of representation with no cure).

On the other hand, it is at least possible that RFD-TV might bring itself back into compliance with the FCC's rules, thereby allowing it to become a "qualified programmer" once again. DIRECTV would not, of course, be obligated to carry RFD-TV at that point. It nonetheless would be interested in continuing to carry RFD-TV in such event in order to minimize disruption to its customers.

Accordingly, please consider this letter as formal notice under the 2002 Agreement and the extension thereto that DIRECTV intends to terminate carriage of RFD-TV no sooner than thirty days from now, unless before such time DIRECTV satisfies itself (in its sole discretion) that RFD-TV has met *each* of the following conditions:

- RFD-TV must immediately cease carriage of auctions conducted by Superior Livestock Auctions, Inc. or any related entities.
- RFD-TV must immediately cease posting any "crawls," "billboards," or any other on-air message directing viewers to DISH Network.
- RFD-TV must demonstrate that all of its programming, and in particular the programming referenced in paragraph 12 of the *FCC Declaratory Ruling*, now complies and will continue to comply with the FCC's rules for a "qualified programmer."

If DIRECTV determines that each of these conditions has been met, and otherwise satisfies itself that it can rely on RFD-TV as a "qualified programmer" for purposes of the set-aside rules, it intends to continue carrying RFD-TV pursuant to the extension. If, however, DIRECTV cannot so satisfy itself, it will terminate carriage of RFD-TV.

I remain, of course, available to discuss this or any other matter with you.

Sincerely,



Reagan E. Feeney

cc: Michael Nilsson (Harris, Wiltshire & Grannis LLP)
Todd Stansbury (Wiley Rein & Fielding LLP)



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December 5, 2006

VIA EMAIL: info@rfd-tv.com and US MAIL

Mr. Patrick Gottsch
President & General Manager
RFD Communications, Inc.
4101 International Parkway
Carrollton, TX 75007

Re: *Public Interest Programming Agreement dated December 15, 2001*

Mr. Gottsch:

I am legal counsel to EchoStar Satellite L.L.C. and am sending this letter to you on EchoStar's behalf. Reference is made to the Public Interest Programming Agreement dated December 15, 2001 as amended on December 6, 2002, December 11, 2003, December 9, 2004 and December 15, 2005 (collectively, the "Agreement") by and between RFD Communications, Inc. ("RFD") and EchoStar Satellite L.L.C. ("EchoStar"). This letter shall serve as notice of breach of the Agreement by RFD and RFD's opportunity to cure within thirty (30) days.

As you are aware, the pertinent provisions of Section 2.1.1 of the Agreement provide that *"EchoStar may elect not to initiate or to terminate this agreement at any time with or without notice, when EchoStar determines, in EchoStar's sole and absolute discretion, that . . . (b) the programming supplied by Programmer does not qualify as Public Interest Programming under the Public Service Broadcasting requirements, or (c) there is a violation by Programmer of federal statutes or regulations, that apply to Programmer, or any regulations adopted by the FCC that apply to Programmer and Public Interest Programming."*

Despite RFD's clear obligation to comply to the Public Service Broadcasting requirements, RFD has failed, as evidenced by *In the Matter of Farm Journal, Inc., Petition for Declaratory Ruling*, Order and Declaratory Ruling, MB Docket No. 06-92 (December 4, 2006). RFD has thirty (30) days to cure under the pertinent provisions of Section 5.2.

Please contact Michael McKenna immediately to resolve this matter. This letter is sent without prejudice to EchoStar's rights and remedies, each of which are hereby expressly reserved.

Sincerely,

A handwritten signature in black ink that reads "Todd T. Hoy". The signature is written in a cursive, flowing style.

Todd T. Hoy